In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-263

LIBBEY-OWENS-FORD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 57a-81a) is reported at 495 F. 2d 1195; its earlier opinion (Pet. App. 30a-42a) is reported at 463 F. 2d 31. The Board's original decision and order (Pet. App. 22a-29a) are reported at 189 NLRB 871; the related representation case decision (Pet. App. 1a-22a) is reported at 169 NLRB 126. The Board's supplemental decision and order (Pet. App. 43a-55a) are reported at 202 NLRB 29.

JURISDICTION

The order of the court of appeals denying rehearing and rehearing *en banc* was entered on June 13, 1974 (Pet. App. 82a-83a). The petition for a writ

of certiorari was filed on September 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly combined for collective bargaining purposes an existing multi-plant unit and an existing single plant unit of the company's employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 5 of the petition.

STATEMENT

A. Background

The Company manufactures and sells glass and glass products (A. 42a).[1] On January 30, 1939, the Board certified the Union[2] as the collective bargaining representative of a unit consisting of the Company's production and maintenance employees at eight plants located in various parts of the country (A. 4a-5a, 127a-129a). The Company and Union have maintained a continuing bargaining relationship in that unit since the certification (A. 66a, 130a-132a). The Company also has recognized the Union as the bargaining representative for similar employees at two other plants. Each of these additional plants was, however, recognized as a separate unit and each had a separate

---

[1]"A." refers to the appendix to the briefs in the court below.

[2]United Glass and Ceramic Workers of North America, AFL-CIO-CLC.

collective bargaining agreement (A. 43a-44a, 6a). The Company accorded recognition at one plant, located in Brackenridge, Pennsylvania, in 1943, after it had been acquired by purchase; recognition was accorded at the second plant, located in Lathrop, California, in 1962, shortly after the Company constructed it (A. 6a-7a).

On July 13, 1966, the Union filed a petition with the Board seeking to clarify the existing multi-plant unit by including the represented employees in the single plant units at Brackenridge and Lathrop (A. 87a). Following a hearing, the Board directed separate elections at the Lathrop and Brackenridge plants to determine whether the employees desired to be included in the larger multi-plant unit. The Board concluded that, since the existing separate units or multi-plant unit were equally appropriate, the unit placement of the disputed employees should be determined by a majority vote of the employees in the affected single-plant units (Pet. App. 8a-13a). Members Fanning and Jenkins dissented from the decision because, in their view, the Board lacked authority under the Act for holding an election to determine the unit placement of represented employees (Pet. App. 15a-19a).[3]

At the elections held among the employees of the Brackenridge and Lathrop plants, a majority of the employees in each unit voted in favor of being represented in the multi-plant unit. On December 10, 1968, the

---

[3]The Company sought to enjoin the elections by filing suit in the United States District Court for the District of Columbia. The district court granted the injunction but that decision was reversed by the court of appeals for lack of jurisdiction over the subject matter. *McCulloch* v. *Libbey-Owens-Ford Glass Co.*, 403 F. 2d 916 (C.A. D.C.), certiorari denied, 393 U.S. 1016.

Board, with Members Fanning and Jenkins again dissenting, overruled the Company objections to the election, and ordered that the existing multi-plant unit be clarified to include the production and maintenance employees at the Lathrop and Brackenridge plants (Pet. App. 19a-22a).

When the Company subsequently refused to include the Brackenridge employees in the multi-plant unit, the Union filed an unfair labor practice charge against the Company alleging that its refusal was contrary to the Board's unit-clarification decision (A. 88a, 41a). The Board dismissed the complaint. Members Fanning and Jenkins based their decision on their previously stated view that the Board lacked statutory authority to determine the unit placement of represented employees by conducting elections to clarify existing bargaining units (Pet. App. 22a-25a). Chairman Miller concurred in the dismissal because, in his view, the Board's "duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties" (Pet. App. 26a-28a). Members Brown and Kennedy, in separate dissents, concluded that the underlying certification was a proper exercise of the Board's authority, that the Company was under a duty to honor that certification, and that its failure to do so constituted a violation of its bargaining obligation (Pet. App. 28a-29a).

On review, the court of appeals held that the unit clarification procedure was an appropriate mechanism for consolidating existing appropriate bargaining units, and that the Board possessed statutory authority to conduct the clarification elections at the Brackenridge and Lathrop plants. The court found, however, that because of their respective views of the case, neither Members

Fanning and Jenkins nor Chairman Miller had passed on the appropriateness of the multi-plant unit. Accordingly, the court remanded the case to the Board to make such a determination, unless it decided not to proceed with the case for policy reasons.

B. The Instant Board and Court Decisions

On remand, the Board concluded that the Company, by refusing to bargain with the Union on behalf of its Brackenridge employees as part of the clarified multi-plant unit, violated Section 8(a)(5) and (1) of the Act (Pet. App. 49a). The Board ordered the Company to bargain with the Union upon request in such a multi-plant unit (Pet. App. 50a-51a).

The court of appeals (with Judge Rosenn dissenting) enforced the Board's order. The court held that the Board's finding that a multi-plant bargaining unit which included the Brackenridge plant was appropriate was supported by substantial evidence. The court also held that the Board's unit determination was not arbitrary or capricious. (Pet. App. 56a-81a.)

ARGUMENT

The Board's finding that an existing multi-plant unit could properly be combined with two existing single-plant units, for collective bargaining purposes, turns on the facts of this particular case and constitutes a reasonable exercise of the broad discretion accorded the Board in fixing appropriate units. Thus, no issue warranting review is presented.[4]

---

[4]The question whether the Board has statutory authority to hold an election for the purpose of determining whether employees already represented by a union in one unit desire to be included

Section 9(b) of the Act directs the Board in each case to determine whether "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." As this Court observed in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491, the determination of an appropriate unit "involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422-423.

The court of appeals correctly concluded that the Board's unit determination in this case was reasonable. "[F]irst, * * * the history of bargaining between the Company and the Union demonstrates a pattern of successful bargaining in a unit of widely scattered plants which are not functionally or operationally integrated, and, second, * * * the Brackenridge and Lathrop plants do not differ significantly from those plants which, over the years, have been successfully integrated into a single, multi-

---

in a larger unit represented by that union is not properly presented here. The court below, in its original decision, held that the Board has such authority (Pet. App. 36a-40a) (see also *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 267-268). The Company did not seek review of that decision; the only issue which it raised in the second proceeding below was "whether the Board's underlying unit determination was erroneous" (Pet. App. 62a).

plant unit" (Pet. App. 64a).[5] In addition, the employees at the separate plants expressed a preference to be included in the multi-plant unit.

Petitioner contends (Pet. 12) that the policies of the Act are impaired by permitting the Board to consolidate "preexisting bargaining units in the absence of mutual consent and without any finding that the existing units have become inappropriate due to changed circumstances, or that consolidation will improve labor relations." Contrary to petitioner's assertion (Pet. 13), however, the consolidation of the existing units here did not erode "the stability of labor relations." As the court below noted (Pet. App. 64a), "for the past 40 years the Company and the Union have been bargaining on a multi-plant basis, and during that period the unit has been enlarged as the Company has acquired new plants." While "there is also a history of successful bargaining between the Company and the Union in the single-plant unit at Brackenridge," that "fact alone does not conflict with the Board's finding that the inclusion of Brackenridge in the multi-plant unit would also be appropriate, for there is no reason to infer that a history of successful bargaining within a single-plant unit would interfere with successful bargaining by the same parties on a broader basis" (Pet. App. 65a).[6]

---

[5]Insofar as petitioner contends that conditions at the Brackenridge plant substantially differed from those of the others plants (Pet. 15), the court of appeals found (Pet. App. 66a-67a) that substantial evidence supported the Board's finding to the contrary. That issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

[6]*Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705, relied upon by petitioner (Pet. 15), is inapposite. That case involved the propriety of a Board bargaining order issued to remedy an unlawful refusal to bargain which had the effect of dissipating the union's original majority.

Nor has the Board abdicated "its responsibility to determine whether the consolidated unit is 'appropriate' by relying on the ostensible desires of the Brackenridge employees," as petitioner contends (Pet. 16). As the court below concluded, in its original decision, the Board properly elicited the views of the employees in aid of its responsibilities under Section 9(b) of the Act to fix units to insure employees the "fullest freedom" in exercising statutory rights (Pet. App. 40a). Employee views are highly relevant to unit determinations. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 156. In analogous situations, the Board has long utilized its election processes to afford craft employees the opportunity to choose whether they wished to be represented separately or included in a larger unit. See *Globe Machine and Stamping Co.,* 3 NLRB 294; *National Labor Relations Board* v. *Underwood Machinery Co.,* 179 F. 2d 118 (C.A. 1); *National Labor Relations Board* v. *Weyerhaeuser Co.,* 276 F. 2d 865, 872 (C.A. 7). In short, where, as here, the Board finds two or more units to be equally appropriate, it may properly exercise its duty to determine the appropriate unit "by conducting an election to determine employees' preference" (Pet. App. 40a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ROBERT A. GIANNASI,
Assistant General Counsel,
National Labor Relations Board.

OCTOBER 1974.